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No. 75-260

In the Supreme Court of the United States

OCTOBER TERM, 1975

L. N. McDONALD AND RAYMOND L. LAIRD,
PETITIONERS

v.

SANTA FE TRAIL TRANSPORTATION COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether a complaint by white employees that their employer discriminated against them on the basis of race in firing them for theft of company property while retaining a similarly situated black employee states a claim under Title VII of the Civil Rights Act of 1964.

2. Whether a white person has standing under 42 U.S.C. 1981 to sue for alleged racial discrimination in employment.

INTEREST OF THE UNITED STATES

Pursuant to Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. 2000e *et seq.*, the Attorney General, as well as the Equal Employment Opportunity Commission, has responsibility for enforcement of federal laws providing for equal employment opportunity. This case, although brought by private plaintiffs, presents questions concerning Title VII's prohibition of discrimination on account of race, color, religion, sex, or national origin in cases where offenses constituting crimes against the company are involved. Similar issues arise in cases brought by the government, and the outcome here will accordingly affect the government's enforcement responsibilities under the Act.

Resolution of the Section 1981 issue presented in this case will also have an impact on the government's responsibilities under Title VII. In the context of a suit by an aggrieved black employee, Section 1981 has been held to provide a private remedy independent of those authorized under Title VII for redress of employment discrimination claims. *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454. Whether whites have standing to sue under Section 1981, or must rely exclusively on the procedures and remedies under Title VII, will thus affect the government's enforcement responsibilities.

STATEMENT

On October 2, 1970, petitioner McDonald was a truck driver employed by respondent Sante Fe Trail

Transportation Company in Houston, Texas. Petitioner Laird was a dock foreman at the company's Houston terminal (Pet. App. G, p. 53). On that date both were fired, having been charged by the company six days earlier with theft of ten cases of antifreeze from a customer's shipment (Pet. 3; Pet. App. F, pp. 49–50). A black employee, also charged with the theft, was retained (Pet. App. G, p. 55).[1]

Petitioner McDonald immediately filed a grievance with respondent Local Union No. 988, denying the theft and complaining of wrongful discharge (Pet. App. F, p. 49–50).[2] The grievance was denied and on April 7, 1971, petitioners filed a charge with the Equal Employment Opportunity Commission alleging that the company had engaged in unlawful discrimination in employment.[3] The Commission issued a right-to-sue

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[1] There is no indication that any of the three employees have been charged criminally, and petitioners state (Br. 21, n. 42) that criminal charges have not been filed against them.

[2] The Grievance Report was dated October 8, 1970 (Pet. App. F, p. 49), but petitioners alleged and the company agreed that the grievance was commenced "[o]n or about October 2," the date of discharge (Pet. App. G, p. 55; Pet. App. B, p. 26).

[3] In the district court, Santa Fe alleged that the grievance proceeding had terminated on October 29, 1970 (Pet. App. B, p. 26), and that therefore the then-applicable 90-day period for filing a charge with the EEOC had run prior to petitioners' filing on April 7, 1971. (See 42 U.S.C. 2000e–5(d) (1970), since amended to allow for 180 days, 86 Stat. 104, 42 U.S.C. (Supp. IV) 2000e–5(e).) Petitioners alleged that notice of the termination of the grievance procedures was not received until April 3, 1971 (Pet. App. G, p. 55). The district court did not rule on the timeliness of petitioners' filing since "the nature of the notice given upon termination of grievance proceedings" would be dispositive and "that is

letter on July 15, 1971, and on August 16, 1971, petitioners commenced this action against Sante Fe and the Union in the United States District Court for the Southern District of Texas. Petitioners charged that, in violation of Title VII and Section 1981, Sante Fe had discriminated against them on the basis of race in discharging them while retaining the black employee who was also charged with theft, and that the Union had "acquiesced and/or joined in" the unlawful discrimination (Pet. App. G, pp. 55–57). Petitioners sought a declaratory judgment, preliminary and permament injunctions, reinstatement, and back pay (*id.* at 57–58).

The district court dismissed the complaint, ruling that white persons lack standing to sue under Section 1981, and that the facts alleged by petitioners failed to state a claim under Title VII (Pet. App. B, pp. 24–28).[4]

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a matter which would require an evidentiary hearing" (Pet. App. B, pp. 26–27). From this it appears that the district court assumed that the filing of the grievance with the Union would toll the 90-day period, which runs from the date when "the alleged unlawful employment practice occurred" (42 U.S.C. 2000e–5(d) (1970), as amended, 42 U.S.C. (Supp. IV) 2000e–5(e)). Neither the validity of this assumption (which is supported by controlling precedent in the Fifth Circuit, *Culpepper* v. *Reynolds Metals Company*, 421 F. 2d 888, *Hutchings* v. *United States Industries, Inc.*, 428 F. 2d 303) nor the timeliness of petitioners' filing with the EEOC is presented to this Court; both are matters that, if petitioners prevail here, should be determined on remand.

[4] The court also ruled that it had no Title VII jurisdiction over the Union because it had not been named by petitioners in their EEOC charge. Petitioners have not contested this determination and thus the Union's liability, if any, can be based only on Section 1981.

The court of appeals affirmed *per curiam* (Pet. App. A, pp. 21–23). It held that "an employer's dismissal of white employees charged with misappropriating company property while not dismissing a similarly charged black employee does not raise a claim upon which relief may be granted under Title VII," and that Section 1981 "confers no actionable rights upon white persons" (Pet. App. A, p. 22).

ARGUMENT

INTRODUCTION AND SUMMARY

1. Much of the impetus behind the Civil Rights Act of 1964 came from Congress' desire to rid this Nation of discrimination against blacks. The Act in its entirety, however, and Title VII in particular, go far beyond assuring equal civil rights to blacks alone: Title VII, for example, prohibits employment discrimination against "any individual" because of such individual's "race, color, religion, sex, or national origin." 42 U.S.C. 2000e–2(a). It follows that the claim of employment discrimination raised in this case is not barred under Title VII simply because those asserting it happen to be white.

Nor have petitioners lost the protections of Title VII by allegedly engaging in conduct amounting to a crime against their employer. It is true that employers are not forbidden by Title VII from firing individuals for theft, but such employee conduct does not relieve employers of their obligation to refrain from discriminating on the basis of race. Under Title

VII, an employer may not fire an individual for race-related reasons, even if other, racially neutral justifications for the discharge exist. *McDonnell Douglas Corporation* v. *Green*, 411 U.S. 792.

McDonnell holds that, although an employer may meet an employee's *prima facie* showing of unlawful discrimination by articulating a legitimate, nondiscriminatory reason for the employment action taken, the employee must be given a fair opportunity to demonstrate that the employer's asserted justification is merely a pretext for a racially motivated employment decision. This means, in the context of this case, that petitioners' complaint should not have been dismissed without their first having been "given a full and fair opportunity to demonstrate by competent evidence that whatever the stated reasons for [their discharge], the decision was in reality racially premised" (411 U.S. at 805, n. 18).

2. Section 1981, perhaps even more than the Civil Rights Act of 1964, resulted from congressional concern for the rights of black persons. Its origins lie in Section 1 of the Civil Rights Act of 1866, 14 Stat. 27, and it grants to all persons the same several rights therein enumerated "as [are] enjoyed by white citizens." Yet neither this phrase nor the statute's source denies whites standing to enforce its terms. The legislative history of the 1866 Act shows that it was intended to secure the rights of whites as well as blacks, and that the reference to "white citizens" was meant, not to restrict the benefits of the legislation to blacks, but "to emphasize the racial character of the rights being

protected." *Georgia* v. *Rachel*, 384 U.S. 780, 791. In any event, if there is to be force behind the statute's command that "all persons" shall have the same right to contract for their employment services "as is enjoyed by white citizens," then white citizens themselves must be able to exercise such rights free of racial discrimination, for as their rights are abridged so are "all persons['']." There is no reason to believe that Congress meant to insist upon racially neutral treatment of non-whites alone; the denial of employment opportunity, based upon what ought to be the irrelevant consideration of race, is no less unfair when aimed at whites.[5] In either case racial prejudice causes an immediate injustice, contributes to overall racial discord, and defeats the congressional goal of assuring all persons equal rights under the law regardless of race.

Although whites faced with racial discrimination in employment may invoke the protections afforded by Title VII, the availability of redress under Section 1981 remains important. Section 1981 reaches employers not subject to Title VII, and authorizes remedies not available under that statute. "Congress has made available * * * independent administrative and judicial remedies. The choice is a valuable one." *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 461. Congress meant it to be available to whites as well as non-whites.

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[5] This case does not present, and we do not address, questions presented in the context of actions undertaken, in judicial proceedings or otherwise, to remedy the effects of past discrimination.

I

TITLE VII ENCOMPASSES A CLAIM THAT WHITE EMPLOYEES WERE FIRED FOR MISAPPROPRIATING COMPANY PROPERTY WHILE A SIMILARLY SITUATED BLACK EMPLOYEE WAS NOT

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin" (42 U.S.C. 2000e–2 (a)(1)). The protection against unlawful discrimination thus afforded is sweeping: racial and other impermissible considerations under the statute are to play no part in employment decisions. Otherwise Title VII does not interfere with an employer's conduct of his business. The decision whom to employ, what wage to pay, what promotion and retirement policy to follow, and whom to fire—all of these an employer is free to make under Title VII for any reason or no reason at all, so long as race and the other listed characteristics remain neutral factors.

Petitioners, both white, are former employees of respondent Sante Fe. They and a black employee of Sante Fe were charged by the company with theft of company property. They were fired: the black was not. In their complaint petitioners alleged (Pet. App. G, p. 55) that Sante Fe "imposed a more severe disciplinary sanction against them because of their race, Caucasian[,] than against their [N]egro counterpart." This states a cause of action under Title VII and the courts below erred in denying petitioners an opportunity to prove their allegations.

The judgment below apparently was not based on a holding that whites lack standing under Title VII to complain of racial discrimination in employment. Such a ruling, in any event, would be unsupportable. Title VII applies broadly to prohibit discrimination in employment against "any individual," not only on account of race, but also because of such individual's "color, religion, sex, or national origin." 42 U.S.C. 2000e–2(a)(1). Nothing in the language of the statute or its legislative history indicates that Congress intended these protections to apply selectively. On the contrary, as this Court observed in *Griggs* v. *Duke Power Company*, 401 U.S. 424, 431:

> Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications.

Instead the courts below appear to have believed that an employee loses the protection of Title VII if he engages in conduct amounting to a crime against his employer. Thus, the court of appeals ruled (Pet. App. A, pp. 22–23), in language very similar to the district court's (Pet. App. B, p. 28), that "an em-

ployer's dismissal of white employees charged with misappropriating company property while not dismissing a similarly charged black employee does not raise a claim upon which relief may be granted under Title VII * * *. There is no allegation that plaintiffs were falsely charged. Disciplinary action for offenses not constituting crimes is not involved in this case. See *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 * * *."

McDonnell Douglas does indeed control this case, but it requires a different result than that reached below. In that case plaintiff Green, a black employee, was discharged for what he considered to be racial reasons, and in protest he interfered with access to his employer's plant. He was charged with and pleaded guilty to obstruction of traffic. When the employer began to recall other laid off employees it refused to rehire Green, citing his illegal conduct. Green's Title VII suit alleged that the employer's asserted reason was mere pretext for another racially motivated employment decision.

This Court took the occasion to clarify the rules concerning the order and allocation of proof in private, nonclass-action Title VII cases. It ruled that the complainant must first make out a *prima facie* case, and it gave an example of how such a showing might be made (411 U.S. at 802; footnote omitted):

> This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

In giving this example, the Court was not setting out an immutable catalogue of the elements necessary to a *prima facie* case in every Title VII action. The Court expressly noted (411 U.S. at 802, n. 13) that different factual situations will call for different showings. If the complainant in *McDonnell Douglas* had been white, for example, and thus unable to satisfy the first of the four elements above, then presumably he would have to supplement the other three, assuming they could be established, with some other fact tending to show that he had been the victim of racial discrimination. A showing, for example, that the employer had hired only blacks over a long period, notwithstanding applications from qualified whites, might be sufficient in such a case.

Where a black complainant alleges that he has been discharged for racial reasons, then under *McDonnell Douglas* he presumably could make out a *prima facie* case by showing (1) that he belonged to a minority, (2) that he was qualified for and satisfactorily performing his job, (3) that he was fired nonetheless, and (4) that the employer sought to or did replace him with someone else of similar qualifications. A white complainant in a similar case, unable to show

membership in a minority, would have to supply an appropriate substitute for the first element in order to establish a presumption of racial discrimination. This he might do, we suggest, by showing that the supposed reason for which he was fired applied equally to a black employee, who was not fired.

This, of course, is essentially what petitioners have alleged they can prove, and nothing in the pleadings demonstrates their inability to do so. If they succeed "[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for [petitioners'] rejection" (411 U.S. at 802).[6] Dismissal of petitioners' complaint for failure to state a claim under Title VII was therefore erroneous. *Conley* v. *Gibson*, 355 U.S. 41.

The Court in *McDonnell Douglas* noted that the employer had met Green's *prima facie* showing of discrimination by assigning his criminal conduct as the reason for refusing to rehire him. "Nothing in Title VII," said the Court, "compels an employer to absolve and rehire one who has engaged in such deliberate, unlawful activity against it" (411 U.S. at 803; footnote omitted). Presumably the judgment below rests on this ruling, but the Court's analysis did not stop so abruptly (*id* at 804):

> [T]he inquiry must not end here. While Title VII does not, without more, compel rehiring of respondent, neither does it permit petitioner to use respondent's conduct as a pretext for the sort of discrimination prohibited by § 703(a)(1). On remand, respondent must, as the Court of Appeals recognized, be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretext. Especially relevant to such a showing would be evidence that white employees involved in acts against petitioner of comparable seriousness to the "stall-in" were nevertheless retained or rehired. Petitioner may justifiably refuse to rehire one who has engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races.

In short, nothing in Title VII prevents Santa Fe from following a pattern of firing all employees who steal from the company. Indeed, that statute does not prevent Santa Fe from firing some but not all such employees. It forbids Santa Fe absolutely, however, from treating employees differently on the basis of race, and this prohibition applies with equal force to all employment decisions, even those made in the wake of criminal conduct by the employee against the company. Accordingly, the judgment below should be reversed so that petitioners may have "a full and fair opportunity to demonstrate by competent evi-

[6] If, as petitioners claim, the black employee was similarly situated to petitioners in regard to the alleged theft, then Santa Fe will not be able to claim that alleged theft is an absolute disqualification to continued employment. It may be, however, that the black employee was not similarly situated to petitioners in other respects, and that he was treated differently for legitimate, nondiscriminatory reasons, but dismissal of petitioners' complaint precluded inquiry into these matters.

dence that whatever the stated reason for [their discharge]" (411 U.S. 805, n. 18), Santa Fe "imposed a more severe disciplinary sanction against them because of their race" (Pet. App. G, p. 55).

II

WHITE PERSONS HAVE STANDING UNDER 42 U.S.C. 1981 TO COMPLAIN OF RACIAL DISCRIMINATION IN EMPLOYMENT

Section 1981 guarantees that "[a]ll persons" shall enjoy equally the several rights therein enumerated, including the right to contract for one's employment services. *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454. Previous rulings of this Court establish that both aliens and blacks have standing to enforce the provisions of Section 1981, and indicate that whites have standing thereunder to vindicate the civil rights of blacks. The anomalous result reached by the court below, that Congress meant to grant standing in those circumstances yet deny the sweeping protection of Section 1981 to white persons as a class, is refuted by the statute on its face and its legislative history. With its origins in the Civil Rights Act of 1866, 14 Stat. 27, the underlying purpose of which was to assure equal civil rights to all persons in the United States, Section 1981 was meant equally to protect whites and non-whites. The description of the rights therein protected as those "enjoyed by white citizens" was intended to stress their racial character and their scope,

not to exclude white victims of racial discrimination from the statute's ambit.

Section 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

On its face this provision applies without exception to "[a]ll persons." The suggestion implicit in the judgment below, that the phrase "as is enjoyed by white citizens" was meant to deny whites the protections of the statute, is without support in logic or legislative history. Prior to the remedial Civil War legislation, of which Section 1981 is a part, "white citizens" possessed rights denied to blacks, who were ineligible for citizenship because of their race. In conveying rights to the same extent as those enjoyed by "white citizens," Congress in Section 1981 bestowed those rights upon "[a]ll persons" to the full extent enjoyed by the theretofore most favored segment of the population. Congress could not have meant that the specified rights of white citizens could be diminished in comparison with those of another racial group. For such diminution of the rights of white citizens would lead to a corresponding shrinkage

in the rights of "[a]ll persons," a result Congress surely did not intend.

Section 1981 is derived from Section 1 of the Civil Rights Act of 1866, 14 Stat. 27 (*Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 422, n. 28), which provided:

> That all persons born in the United States and not subject to any foreign power * * * are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude * * * shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

The broad purposes of the 1866 Act were to assure "the fundamental principle of citizenship by birth within the dominion" (*United States* v. *Wong Kim Ark*, 169 U.S. 649, 675) and to "affirmatively secure for all men, whatever their race or color, * * * the 'great fundamental rights'" therein enumerated (*Jones, supra*, 392 U.S. at 432). When the 1866 Act was reenacted following passage of the Fourteenth Amendment, the rights to hold and convey property were codified in what is now 42 U.S.C. 1982, and are

conferred upon "[a]ll citizens of the United States."[7]

The remaining rights, however, which now appear in Section 1981, are given equally to "[a]ll persons." Thus the "broad and sweeping nature of the protection meant to be afforded by § 1 of the Civil Rights Act of 1866" (*Sullivan* v. *Little Hunting Park*, 396 U.S. 229, 237) has been extended under Section 1981 to aliens as well as to citizens. *Graham* v. *Richardson*, 403 U.S. 365, 377; *Takahashi* v. *Fish and Game Commission*, 334 U.S. 410, 419–420; *United States* v. *Wong Kim Ark*, 169 U.S. 649, 675, 688; *Inada* v. *Sullivan*, 523 F. 2d 485 (C.A. 7); *Guerra* v. *Manchester Terminal Corporation*, 498 F. 2d 641, 653–654 (C.A. 5); *Roberto* v. *Hartford Fire Insurance Company*, 177 F. 2d 811 (C.A. 7); *Hollander* v. *Sears, Roebuck and Company*, 392 F. Supp. 90, 94, n. 5 (D. Conn.); see also *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369. The standing thus conferred extends to aliens of all races, including Caucasians (see *Roberto, supra*).

In *Wong Kim Ark, supra*, this Court extensively reviewed the Civil Rights Act of 1866 and its relationship to the Fourteenth Amendment. In that case the issue was whether an individual born of Chinese nationals domiciled in the United States is an American citizen if his birth occurs in this country. The

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[7] The 1866 Act, passed pursuant to the authority granted Congress by the Thirteenth Amendment, was reenacted upon passage of the Fourteenth Amendment by Section 18 of the Enforcement Act of 1870, 16 Stat. 140. Section 1982 provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

Court ruled that both the Civil Rights Act of 1866 and the Fourteenth Amendment, whose origins and purposes were in many respects identical,[5] were intended unmistakably to affirm the common law's positive answer to that question. 169 U.S. at 675–676. Although the main purpose of the Amendment was "to establish the citizenship of free [N]egroes * * * and to put it beyond doubt that all blacks, as well as whites, born or naturalized within the jurisdiction of the United States, are citizens," the Court said that "the opening words 'All persons born,' are general, not to say universal, restricted only by place and jurisdiction, and not by color or race—as was clearly recognized in all the opinions delivered in *The Slaughterhouse Cases* * * *" (169 U.S. at 676). Thus notwithstanding that the Fourteenth Amendment had as its principal design the amelioration of discrimination against blacks, it gave to them " 'no right superior to that granted to the white race' " and " '[t]he same rule must be applied to both races' " (*id.* at 692).

Section 1981 (then Section 1977 of the Revised Statutes) was to the same effect. By Section 1 of the Civil Rights Act of 1866, the Court noted, " 'all persons born in the United States, and not subject to any foreign power * * * are declared to be citizens of the United States. This provision comprehends the

[5] See also *Hurd* v. *Hodge*, 334 U.S. 24, 32: "[T]hat statute and the Amendment were closely related both in inception and in the objectives which Congress sought to achieve. * * * It is clear that in many significant respects the statute and the Amendment were expressions of the same general congressional policy."

Chinese * * *, the people called Gypsies, as well as the entire race designated as blacks * * *. Every individual of these races, born in the United States, is, by the bill, made a citizen of the United States' " (169 U.S. at 682). This view of the statute was based on unequivocal legislative history: during the Senate debates it appeared clearly that the Act would confer citizenship on Germans, Chinese, Gypsies—indeed, "all persons, without any reference to race or color," born in this country of alien parents domiciled here. *Id.* at 697–698.

The Court also explained that no constriction of the 1866 Act was to be inferred from its changed appearance when re-enacted in 1870. In its earlier form the statute's guarantees extended to citizens "of every race and color"; in the re-enactment these words were deleted in favor of persons "within the jurisdiction of the United States," the words now found in Section 1981. The substitution, however, "was not considered as making the section, as it now stands, less applicable to persons of every race and color and nationality, than it was in its original form * * *" (*id.* at 695–696).

If so much of Section 1 of the 1866 Act as defined citizenship applies equally to all races, despite its principal intendment to protect blacks, there can, we submit, be no justification for limiting the other guarantees of that statute to exclude whites. In the context of a suit by a black plaintiff, this Court recently ruled "that § 1981 affords a federal remedy

against discrimination in private employment on the basis of race" which supplements and under some circumstances "may be highly preferred over" the distinct avenue of relief afforded by Title VII of the Civil Rights Act of 1964. *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 459–460, 461.[9] Moreover, this Court has held that in appropriate circumstances standing exists in white persons to sue under Section 1982 to vindicate the rights of blacks (*Sullivan* v. *Little Hunting Park*, 396 U.S. 229, 237); given "the historical interrelationship between § 1981 and § 1982" (*Tillman* v. *Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 440), that is tantamount to a ruling that standing under Section 1981 exists in similar circumstances.[10] Thus, the court of appeals' ruling, if affirmed, would ascribe to Congress the intent to allow whites to sue under Section 1981 to redress racial discrimination against non-whites and discrimination based on alienage against themselves, but not racial discrimination against themselves—notwithstanding that non-whites suffer no such disability.

The legislative history of the 1866 Act, however, demonstrates that, in granting to all persons the same rights therein enumerated "as [are] enjoyed by white

[9] See also *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47 and n. 7 (Congress intended Title VII and Section 1981 as "parallel or overlapping remedies against discrimination").

[10] The Second Circuit so held in *DeMatteis* v. *Eastman Kodak Co.*, 511 F. 2d 306, 312, n. 9, and suggested as well that the holding in *Sullivan* was intended to refer to both Sections 1981 and 1982, since that action was brought under both statutes (see 396 U.S. at 235). See also *Valle* v. *Stengel*, 176 F. 2d 697 (C.A. 3).

citizens," Congress did not intend to limit the class of persons for whose benefit the legislation was enacted. The phrase did not appear in the bill as it first passed the Senate. At that time Senator Lyman Trumbull, the floor manager, explained that the bill applied equally to blacks and whites (Cong. Globe, 39th Cong., 1st Sess. 599 (1866)):

> Sir, this bill applies to white men as well as black men. It declares that all persons in the United States shall be entitled to the same civil rights, the right to the fruit of their own labor, the right to make contracts, the right to buy and sell, and enjoy liberty and happiness: * * * Could anything be more monstrous or more abominable than for a member of the Senate to rise in his place and denounce * * * a bill, the only object of which is to secure equal rights to all the citizens of the country, a bill that protects a white man just as much as a black man? With what consistency and with what face can a Senator in his place here say to the Senate and the country that this is a bill for the benefit of black men exclusively when there is no such distinction in it, and when the very object of the bill is to break down all discrimination between black men and white men?

The reference to "white citizens" was subsequently added, without debate, on motion by the House manager of the bill, Congressman James F. Wilson (Cong. Globe, 39th Cong., 1st Sess. 1115 (1866)). Wilson himself appeared to believe that the protections of

the bill were not limited to blacks,[11] but he was apparently concerned lest they be thought to extend to women and children as well.[12] When the bill was resubmitted to the Senate for approval of the House amendments, Senators Trumbull and Van Winkle discussed the meaning of the Wilson amendment and demonstrated their understanding that it had not altered the bill's reach as they had previously perceived it (Cong. Globe, 39th Cong., 1st Sess. 1413 (1866)):

> Mr. VAN WINKLE. There seems to be an incongruity in this language to which I wish

[11] "Mr. Speaker, if all our citizens were of one race and one color we would be relieved of most of the difficulties which surround us. This bill would be almost, if not entirely, unnecessary, and if the States, seeing that we have citizens of different races and colors, would but shut their eyes to these differences and legislate, so far at least as regards civil rights and immunities, as though all citizens were of one race and color, our troubles as a nation would be well-nigh over. But such is not the case, and we must do as best we can to protect our citizens, from the highest to the lowest, from the whitest to the blackest, in the enjoyment of the great fundamental rights which belong to all men." Cong. Globe, 39th Cong., 1st Sess. 1118 (1866).

[12] The only explanation Congressman Wilson gave for the amendment came in response to an inquiry from Congressman Delano whether it would confer upon blacks the right to be jurors. Wilson said it would not: "The words to which the gentleman has directed attention were not in the original bill, but were placed there by an amendment offered by myself. And the reason for offering it was this: it was thought by some persons that unless these qualifying words were incorporated in the bill, those rights might be extended to all citizens, whether male or female, majors or minors. So that the words are intended to operate as a limitation and not as an extension; and I think the very reason which was urged by those who desired the amendment to be incorporated in the bill, is an answer to the objection the gentleman makes." Cong. Globe, 39th Cong., 1st Sess. (House App. p. 157) (1866)

> to call the attention of the chairman of the committee. The clause commences with the words "and such citizens." As I understand those words they include all persons who are or can be citizens, white persons and all others. The clause then goes on to provide that "such citizens of every race and color, without regard to any previous condition of slavery or involuntary servitude, shall have the same right to make and enforce contracts," &c., "as is enjoyed by white citizens." It seems to me these words are superfluous. The idea is that the rights of all persons shall be equal; and I think the clause, leaving out these words, would attain the object. This is merely a verbal criticism. I think the bill is incongruous in expression as it stands.
>
> Mr. TRUMBULL. I quite agree with the Senator from West Virginia that these words are superfluous. I do not think they alter the bill. I think the bill would be better without them, but they have been adopted by the House of Representatives. We did not think they altered the meaning of the bill; and we did not think it worth while to send the bill back just because these words were inserted by the House. They thought there was some importance in them and have inserted them; and as in the opinion of the [conference] committee which examined this matter they did not alter the meaning of the bill, the committee thought proper to recommend a concurrence, and I hope the Senate will concur in it.

In short, the phrase, "as is enjoyed by white citizens," was not intended to limit standing under Sec-

tion 1981 to non-whites. Instead, those words were apparently intended to point up the limits on the kind of rights protected by the statute. As this Court noted in *Georgia* v. *Rachel*, 384 U.S. 780, 791:

> The legislative history of the 1866 Act clearly indicates that Congress intended to protect a limited category of rights, specifically defined in terms of racial equality. As originally proposed in the Senate, § 1 of the bill that became the 1866 Act did not contain the phrase "as is enjoyed by white citizens." That phrase was later added in committee in the House, apparently to emphasize the racial character of the rights being protected.[13]

Here petitioners, alleging "that they were discharged [because] of their race, Caucasian" (Pet. App. G, p. 54), seek to protect interests clearly "within the zone of interests to be protected" by the statute. *Association of Data Processing Service Organizations* v. *Camp*, 397 U.S. 150, 153. As we have shown, Congress intended Section 1981 to protect "[a]ll persons" from racial discrimination in employment, and accordingly the court of appeals erred in denying petitioners standing on the basis of their race.

[13] The courts have, accordingly, dismissed complaints under Section 1981, by both white and black plaintiffs, when racial discrimination has not been alleged. *E.g., Agnew* v. *City of Compton*, 239 F. 2d 226 (C.A. 9), certiorari denied, 353 U.S. 959; *State of Louisiana ex rel. Purkey* v. *Ciolino*, 393 F. Supp. 102 (E.D. La.); *Clifton* v. *Grisham*, 381 F. Supp. 324 (N.D. Miss.); *Kurylas* v. *Department of Agriculture*, 373 F. Supp. 1072 (D.C.C.), affirmed *per curiam*, 514 F. 2d 894 (C.A.D.C.); *Van Hoomissen* v. *Xerox Corporation*, 368, F. Supp. 829, 838–839 (N.D. Calif.).

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

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